SUPREME COURT, U. S.

JAN 28 1975

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-931

CLIFFORD C. TERRY, *Petitioner*

Against

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the Court of Claims of the United States

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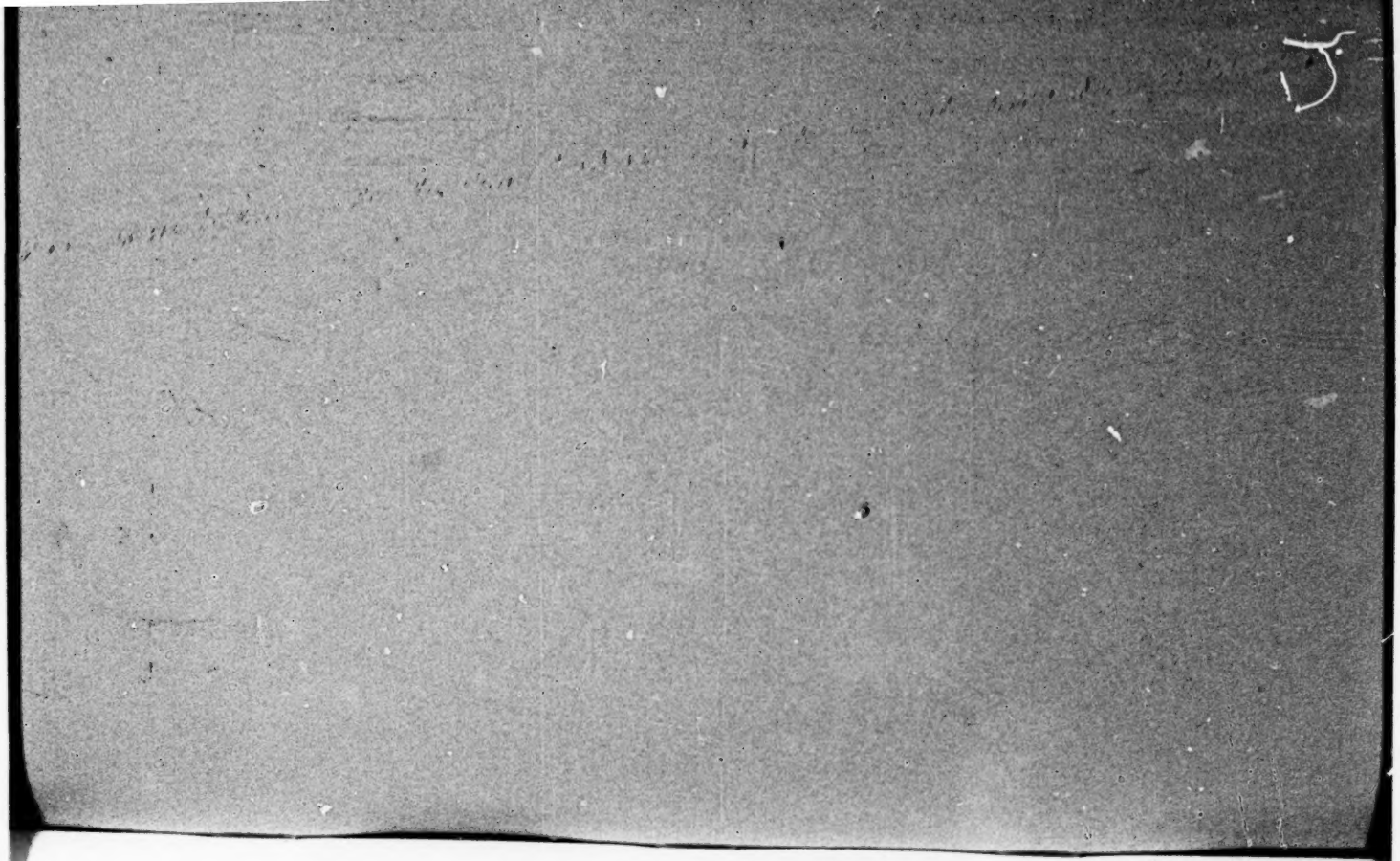

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IN THE

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OCTOBER TERM, 1974

NO._____

CLIFFORD C. TERRY, *Petitioner*

Against

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the Court of Claims of the United States

The Petitioner, CLIFFORD C. TERRY, prays that a Writ of Certiorari be issued to review the judgment of the Court of Claims of the United States of June 19, 1974, and Order Overruling Motion for Rehearing dated November 1, 1974.

OPINION BELOW

The opinion of the United States Court of Claims pertaining to this cause is reported at 499 F.2d 695 (1974) and is appended hereto and identified as Appendix "A". The decision was rendered on June 19, 1974, and denied Petitioner's Motion for Summary Judgment and granted Respondent's Motion for Summary Judgment. Petitioner's

Motion for Rehearing was overruled by Order of the Court of Claims dated November 1, 1974, which is appended hereto and identified as Appendix "B".

JURISDICTION

The Supreme Court has jurisdiction to review decisions of the Court of Claims by granting Writ of Certiorari. 28 *U.S.C.* 1257(c) and Rule 19(2), Revised Rules of the Supreme Court of the United States of America.

QUESTION PRESENTED

MAY A NON-PROBATIONARY GOVERNMENTAL EMPLOYEE BE DISCHARGED ON THE BASIS OF HIS RESPONSES TO INVESTIGATIVE INQUIRIES THAT WERE BOTH CRIMINAL AND ADMINISTRATIVE IN NATURE, WITHOUT FIRST HAVING BEEN FULLY ADVISED OF HIS OPTIONS AND THE CONSEQUENCES OF HIS CHOICE AND IMMUNIZED AGAINST USE OF HIS RESPONSES, AND THE FRUITS THEREOF, IN A CRIMINAL PROSECUTION OF HIMSELF, WHEN THE EMPLOYEE WAS REQUIRED, AND COULD HAVE BEEN DISCHARGED FOR HIS FAILURE, TO COOPERATE WITH THE INVESTIGATION?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are Title 39, Code to Federal Regulations, Sections 742.12, 742.735-23 (b), 742.735-33, and 742.735-81(a); Postal Manual, Sections 717.311, 742.8, 742.13, 742.32, 744.17, 833.1, and 833.3. All such provisions are appended hereto and identified as Appendix "C".

STATEMENT OF FACTS

On March 17, 1969, R. H. McDONALD, JR., a United States Postal Inspector, went to the South Houston, Texas Post Office with the intent of conducting an audit of Petitioner's cash account. Petitioner was then employed as a distribution and window clerk at the South Houston, Texas Post Office. Inspector McDONALD had previously received information that allegedly indicated Petitioner was probably guilty of criminal misconduct in handling his cash account. This information is directly traceable to Petitioner's supervisor, MR. TESTON, the postmaster of the South Houston branch. MR. TESTON'S motives are at least subject to question, and may have been motivated by personal animosity toward Petitioner. Inspector McDONALD'S investigation and audit was specifically intended to gather evidence for a criminal prosecution of Petitioner. Inspector McDONALD questioned Peti-

tioner for at least six hours without adequately apprising Petitioner of his constitutional and legal rights. Inspector McDONALD allegedly advised Petitioner that his statements might be used against him in a later criminal proceeding. Postal regulations required Petitioner to cooperate with Postal investigations.

Inspector McDONALD had authority and responsibilities, both as a criminal investigator and as a civil service supervisor. He had necessary investigative powers in both the criminal and administrative areas. Petitioner was never fully advised whether Inspector McDONALD was exercising investigative powers pursuant to his criminal duties or his administrative duties, or both. Petitioner's replies to Inspector McDONALD'S inquiries and any statements Petitioner gave were made without an understanding of Inspector McDONALD'S status.

At least six hours after the interrogation was begun, Petitioner signed a statement in which he allegedly admitted the conversion of $30.70 in government funds. Thereafter, effective March 31, 1969, Petitioner was administratively discharged from employment. Petitioner was also criminally indicted for fraudulently obtaining government funds. Both the administrative discharge and the criminal indictment were a direct result of the statement of Petitioner. Criminal charges were later dismissed.

Before Petitioner's second hearing on February 26, 1970, at the Dallas Regional Office of the Civil Service Commission, Petitioner's counsel submitted a request for permission to supply, at Petitioner's own expense, a court reporter for the purpose of obtaining a verbatim transcript of the proceedings. This request was denied. All evidence, substantial or otherwise, which was presented at such

hearing, was either directly or indirectly derived from Petitioner's statement taken on March 17, 1969, by R. H. McDONALD, JR., and the hearing officer determined both the voluntariness and the admissibility of said statement.

The jurisdiction of the Court of Claims rested on the Fifth Amendment of the Constitution of the United States, and 5 *U.S.C.*, Sections 701-04, and 28 *U.S.C.*, Section 1361.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THE DECISION OF THE COURT OF CLAIMS IS INCONSISTENT WITH THE LETTER AND SPIRIT OF AN ENTIRE LINE OF DECISIONS OF THIS HONORABLE COURT

The decision rendered by the Court of Claims is inconsistent with the rationale of a line of cases represented by *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968) [hereinafter cited *Uniformed Sanitation Men I*]. Further, Petitioner contends that the decision is contrary to the holding of *Kalkines v. United States*, 200 Ct. Cl. 570 (1973).

The facts of this case present an opportunity for the Court to decide the question left open in *Gardner* at page 278-79, "[We] need not speculate whether, if Appellant had executed the waiver of immunity in the circumstances, the effect of our subsequent decision in *Garrity v. New Jersey, supra*, would have been to nullify

the effect of the waiver." *Gardner* was an administrative discharge case where the government employees had chosen not to answer questions. The court's reference to *Garrity* speaks to the issue of whether they could have been discharged if they had answered, and their answers had been used against them. In *Garrity*, the governmental employees had answered, but the case is concerned primarily with their subsequent criminal prosecution. Petitioner TERRY presents the issue of administrative discharge based on his statements, made in response to government inquiries. It presents the opportunity to determine the effect of a prior waiver of constitutional rights on a subsequent administrative discharge. In other words, can a waiver that was defective as a matter of law under *Garrity* for criminal prosecution not be defective when used for administrative discharge?

This Court reaffirmed in *Garrity v. New Jersey*, at page 498, that whether there could be a waiver under these circumstances is a federal question for this Court to decide. This Court held, in no uncertain terms, that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of the body politic." Id. at page 567. The circumstances of *Garrity* are present in this appeal. Petitioner was faced with the possibility of criminal prosecution on the one hand and administrative discharge on the other. It is completely illogical to assume that these circumstances do not present the same inherent coercion and duress that was present in the supposed "waiver" in *Garirty*. The decision of the Court of Claims apparently recognizes

the coercion and duress of *Garrity* which specifically proscribed use of the threat of discharge to secure incriminatory evidence against a governmental employee. The decision of the Court of Claims does not, however, seem to recognize that the same inherent coercion and duress is present when threats of criminal prosecution are used to secure evidence to be used later for administrative discharge. Justice Harlan clearly recognized that this converse use would likewise be prohibited. In his dissenting opinion, in which he was joined by Justices Clark and Stewart, Justice Harlan said, "It is quite plain that the logic of [the majority's] prohibiting rule would in this situation prevent the discharge of these policemen." *Garrity* at 508-09.

It is thought that Justice Harlan saw the tainted waiver for what it was, wholly defective for any use. Once a waiver is determined to be the product of coercion and duress, the statements, and fruits thereof, it produces are not trustworthy or reliable for any purpose.

In *Gardner,* Justice Harlan no longer found it necessary to dissent from the logic first announced in *Garrity.* He concurred in the result because he found in the *Gardner* and *Uniformed Sanitation Men Association I* majority opinions, "a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their duties." *Uniformed Sanitation Men Association I* at 285. The procedural formula is best illustrated by the following language found in the *Gardner* opinion:

> We agree that these factors diffierentiate the situations. If appellant, a policeman, had refused to an-

> swer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, . . . the privilege against self-incrimination would not have been a bar to his dismissal. *Gardner* at 278.

The holdings of this Court clearly prevent the discharge of Petitioner in this case based upon an alleged waiver of his Fifth Amendment privilege against self-incrimination while under the circumstances of inherent coercion and duress identified by this Court in *Garrity*, and without having complied with the procedural formula announced in *Gardner*.

Footnote four of a recent decision of the Court of Claims, *Kalkines v. United States*, 200 Ct. Cl. 570 (1973), is an excellent example of the form of warnings that should be given in kindred situations. These warnings will protect the rights of the person being questioned, as well as give a solid basis for dismissal for refusal to cooperate. The record reflects that no such warnings were given in the instant case. Facts in *Kalkines* are strikingly similar to the facts of this case. Greater similarity will be developed in Petitioner's brief after this Court grants this Petition for Writ of Certiorari. It should be noted that the court in *Kalkines* said that the only issue was ". . . whether the plaintiff was 'duly advised of his options and the consequences of his choice' and was adequately assured of protection against use of his answers or their fruits in any criminal proceeding." (*Kalkines* at 575). Petitioner was not so advised and assured. The undisputed facts that criminal charges were filed and that Petitioner was administratively discharged

are conclusive evidence that the statement obtained was intended to be, and was, in fact, used for the constitutionally impermissible dual purpose. The record is absolutely devoid of any evidence that proper warnings were given.

This Court suggested in *Uniformed Sanitation Men I*, at page 284, the Second Circuit identified in *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 426 F.2d 619 (2d cir. 1970) [hereinafter cited Uniformed Sanitation Men II] at 621, and the Court of Claims approved in *Kalkines*, at 582, footnote 11, the warnings required to be given to a governmental employee such as Petitioner. That warning is:

> "I want to advise you, Mr. _____, that you have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of this State and of the United States, including the right to be represented by counsel at this inquiry, the right to remain silent, although you may be subject to disciplinary action by the Department of Sanitation for the failure to answer material and relevant questions relating to the performance of your duties as an employee of the City of New York.
>
> "I further advise you that the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding except that you may be subject to criminal prosecution for any false answer that you may give under any applicable law, including Section 1121 of the New York City Charter." *Kalkines* at 575.

Those or similar warnings are required to be given by his supervisors or investigators at the time of the interro-

gation. The burden is on the state to prove that such warnings were given. Without proper warnings, the statement given in response to questioning is tainted as a defective prior waiver of constitutional rights. The taint is not diminished by the fact that a government prosecutor later recognized the taint and dismissed the criminal charges. The taint is not removed by the fact that ordinary criminal warnings allegedly were given by Inspector McDONALD, because that is part of the defective prior waiver. The particularly coercive nature of the situation requires more. There must be a specific grant of immunity, but none was given. The taint attached as a result of Inspector McDONALD'S failure to warn and immunize. The taint remains undissipated to this date.

Petitioner is most distressed by the attempt of the Court of Claims to distinguish his situation from that of *Kalkines*. Although the court positively stated that Petitioner was under criminal investigation, it inexplicably concluded that he could not have reasonably believed that he would lose his job if he failed to disclose possibly incriminating information. (*Terry* at 699). This is in sharp contradiction to the proofs submitted by the Petitioner in his supplemental memorandum to direct inquiries of the Court of Claims. The question here is not only, as the court suggests at page 699, whether the regulations in effect at the time required him to give incriminating evidence against himself, but also whether, under the circumstances, he might reasonably conclude that his failure to cooperate could have been grounds for his dismissal.

Respondent has exerted considerable effort to establish the position that Petitioner did not know and could not

have reasonably believed that his failure to cooperate could have resulted in his dismissal. Although Petitioner has steadfastly maintained that he was told he would be dismissed if he did not cooperate, that he knew postal regulations in effect at the time of the investigation required his cooperation, and that postal regulations present unquestionable evidence that Petitioner must have known of the possible effects of his failure to cooperate, the Court of Claims nevertheless held that Petitioner could not have known or reasonably believed that he could be dismissed for his failure to cooperate. The postal regulations that require cooperation by postal employees are appended hereto and identifield as Appendix "B". These rules and regulations, which were in effect at the time of the investigation of Petitioner, leave no doubt that Petitioner could have been dismissed for his failure to cooperate. They further leave no doubt that Petitioner must have been aware of their existence and effect because of *Postal Manual,* Section 742.8, which requires that all employees of the Postal Service must be made aware of these provisions not less frequently than twice a year. There is no conclusion to be reached except that Petitioner must have been aware that he could be discharged for a failure to cooperate.

Petitioner has considered every aspect of the *Garrity-Gardner* rationale and is left no choice but that Petitioner's statement is inadmissible as a matter of law. The recent decision of the Court in *Lefkowitz v. Turley,* 414 U.S. 70 (1973), seems to be unquestionable support for Petitioner's position. In *Lefkowitz,* petitioners were two architects who faced loss of government contracts for their failure to respond to state inquiries. The Court traced

the case law that has grown up in support of the privilege against self-incrimination. The privilege must be weighed against the legitimate interest of government entities to insure effective functioning of the government. In citing *Murphy v. Waterfront Comm'n,* 378 U.S. 52 (1964), *Kastigar v. United States,* 406 U.S. 441 (1972), and *Ullman v. United States,* 350 U.S. 422 (1956), the Court clearly recounts the rise of immunity as the method of securing both interests. The quoted material clearly says immunity *must* be given. The Court also specifically approved of the *Garrity* rationale for a defective prior waiver.

> As already noted, Garrity specifically rejected the claim of an effective waiver when the policemen in that case, in the face of possible discharge, proceeded to answer the questions put to them. . . The same holding is implicit in both Gardner and Sanitation Men. *Lefkowitz* at 83.

The Court is unwavering in its adherence to the use of immunity as the solution. The Court said:

> . . . given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. *Lefkowitz* at 84.

The Court further said:

> . . . But the State may not insist that appellees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold; that answers elicited upon the threat of the loss of employment are compelled and in-

> admissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity. *Lefkowitz* at 84-85.

The unanimous decision of this Court in *Lefkowitz*, with the unquestionable language contained therein, leaves this Petitioner no doubt that his contention will be upheld. The commitment of the Court to support of the great privilege against self-incrimination is one of the cornerstones of our country. It must not be sacrificed.

Petitioner, therefore, for the above and foregoing reasons, petitions this Honorable Court to grant this Petition for a Writ of Certiorari, and, after doing so, hold that Petitioner's statement of March 17, 1969, was the product of inherent coercion and duress as a matter of law, and that the supposed waiver of the privilege against self-incrimination was executed without full advice and knowledge, and is, therefore, of no consequence or effect, thus rendering the statement produced thereby, inadmissible for all purposes.

CONCLUSION

For the reasons stated herein, Certiorari should be granted in this cause. The ruling and judgment of the Court of Claims of the United States should be reversed and this cause remanded to the said Court of Claims to enter an order reversing its prior order and judgment and ordering that Petitioner be reinstated in his former position

with full credit for all back pay and benefits appurtenant to his former position.

Respectfully submitted,

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CERTIFICATE OF PROOF OF SERVICE

I, DON BRADSHAW, Attorney for Petitioner, CLIFFORD C. TERRY, hereby certify that a copy of tne foregoing Petition for a Writ of Certiorari has been deposited in the United States Mail, postage prepaid, air mail, certified, properly addressed to Respondent's Counsel, THE SOLICITOR GENERAL, United States Department of Justice, Washington, D.C. 20530, on this, the 26th day of January, 1975.

DON BRADSHAW

APPENDIX "A"

IN THE

United States Court of Claims

No. 13-73

(Decided June 19, 1974)

CLIFFORD C. TERRY v. THE UNITED STATES

Don Bradshaw, attorney of record, and *Hugh J. Plummer*, for plaintiff.

Rose E. Adewale-Mendes, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

Before COWAN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

Prior to March 31, 1969, the plaintiff, Clifford C. Terry, was employed by the United States Post Office Department as a Distribution and Window Clerk in Houston, Texas. He was a nonprobationary member of the competitive civil service and, as such, was entitled to the protection of the Lloyd-LaFollette Act, 5 U.S.C. § 7501 (1970). Such protection included the right to be discharged from employment only for such cause as

would promote the efficiency of the civil service. He was also entitled to rely on the administrative regulations issued by the Post Office Department and the Civil Service Commission (CSC) which pertained to the discharge of Federal employees with his status.

On March 17, 1969, a Postal Inspector conducted an audit of the plaintiff's cash account which revealed a shortage of approximately $101 in the plaintiff's fixed credit funds. Just prior to the audit, but after the plaintiff knew an audit was about to commence, the Inspector observed the plaintiff attempting to place money from his pocket into his cash drawer. The Inspector told the plaintiff to put the money back into his pocket. After the audit, the Inspector questioned plaintiff about the shortage. Plaintiff then left the premises and returned with two money order receipts.

After further questioning, plaintiff signed a written statement which had been prepared by the Postal Inspector. Part of the statement admitted that the plaintiff had issued for his personal account two money orders in the total amount of $50 and had placed in his cash account only $20 as payment therefor. The money order receipts which the plaintiff had brought to the premises corroborated the written admission.

By letter dated March 20, 1969, the Postal Inspector charged plaintiff with misuse of official funds and notified him that disciplinary action, including discharge from employment, was being proposed. The charge read as follows:

> You are charged with misuse of official funds while employed as a clerk in the South Houston, Texas post office on March 3, 1969, in that you

> issued Money Order No. 7,488,422,434 in the amount of $15.00 with fee of 35¢, and Money Order No. 7,488,472,435 in the amount of $35.00 with fee of 35¢ for your personal use and placed only $20.00 in your cash drawer for these two money orders. You converted $30.70 of fixed credit funds to your personal use to account for these two money orders at the close of business on March 3, 1969.

The plaintiff was given ten days within which to reply.

By letter dated April 24, 1969, the Regional Director of the Post Office Department advised plaintiff that the charge against him was supported by the fact of the shortage in his fixed credit and his initial explanation for the shortage, and that he was therefore discharged from employment. The plaintiff appealed the decision through the agency appellate system. After conducting a hearing, the Post Office Department issued its appellate decision in a letter dated November 21, 1969. The decision sustained the charge against the plaintiff and stated that his removal would serve the best interest of, and promote the efficiency of the Post Office Department. The letter also advised the plaintiff of his right to appeal to the CSC.

Plaintiff appealed the agency decision to the Dallas Regional Office of the CSC. On February 26, 1970, the Regional Office held a hearing at which the plaintiff, the investigating Postal Inspector, and the South Houston Postmaster testified. The Regional Office concluded that the evidence supported the agency's charge, that the plaintiff's removal was processed in accordance with required procedures, and that the agency's action was, therefore, proper. The CSC Board of Appeals and Review (BAR) affirmed the decision of the Regional Office on September 9, 1970. There is no doubt that the most

damaging evidence upon which the Regional Office and the BAR relied in reaching their decisions was the plaintiff's written statement of March 17, 1969.

Plaintiff filed his petition in this court against the United States on February 5, 1973. He asks that the defendant be ordered to reinstate him to his former position and to pay him all back pay from March 31, 1969, until reinstatement. The case is before us on cross-motions for summary judgment and is ready for disposition on facts which are undisputed. The plaintiff also contends, as an alternative to his motion for summary judgment, that summary judgment for the defendant is improper because genuine fact issues are involved which must be resolved by this court. The arguments of the parties in support of their respective positions are stated below.

The defendant's first argument in support of its motion for summary judgment concerns the effect of the Postal Reorganization Act, 39 U.S.C. § 101, *et seq.* (1970), on this court's jurisdiction over claims by discharged employees of the former United States Post Office Department. The Postal Reorganization Act established the United States Postal Service (Postal Service) to replace the U.S. Post Office Department. The defendant argues that under the authority granted by 39 U.S.C. § 2002(a) (1970),[1] the Comptroller General approved the transfer

1. 39 U.S.C. § 2002(a) (1970) provides in pertinent part as follows:

"§ 2002. Capital of the Postal Service.

"(a) * * * The value of assets and the amount of liabilities transferred to the Postal Service upon the commencement of operations of the Postal Service shall be determined by the Postal Service subject to the approval of the Comptroller General, in accordance with the following guidelines:

* * * *

"2. All liabilities attributable to operations of the former Post

to the Postal Service of the unexpended balances of the former Post Office Department for the fiscal year 1971, which began July 1, 1970, but not for prior years. Therefore, the defendant argues, liabilities attributable to the operations of the former Post Office Department, but which cover periods after June 30, 1970, are liabilities of the new Postal Service, not the United States. It contends that since 28 U.S.C. § 1491 (1970), under which the plaintiff claims this court has jurisdiction of his claim, limits this court's jurisdiction to claims "against the United States," this court has jurisdiction over only that portion of the plaintiff's claim which covers the period before July 1, 1970.

Section 5 of the Postal Reorganization Act, Pub. L. 91-375, Aug. 12, 1970, 84 Stat. 774, contains the saving provisions of the Act. Section 5(c)[2] contains the provisions

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Office Department shall remain liabilities of the Government of the United States, except that upon commencement of operations of the Postal Service, the unexpended balances of appropriations made to, held or used by, or available to the former Post Office Department and all liabilities chargeable thereto shall become assets and liabilities, respectively, of the Postal Service."

2. Postal Reorganization Act, Pub. L. 91-375, § 5(c), Aug. 12, 1970, 84 Stat. 774 provides:

"(c) (1) Except as provided in paragraph (2) of this subsection—

"(A) the provisions of this Act shall not affect suits commenced prior to the date this section takes effect; and

"(B) in all such suits proceedings shall be had, appeals taken, and judgments rendered, in the same manner as if this Act had not been enacted.

"No suit, action, or other proceeding commenced by or against any officer in his official capacity as an officer of any department or agency, functions of which are transferred by this Act, shall abate by reason of the enactment of this Act. No cause of action by or against any department or agency, functions of which are transferred by this Act, or by or against any officer thereof in his official capacity shall abate by reason of the enactment of this Act. Causes of ac-

applicable to the case at bar. We believe that Section 5(c) read as a whole indicates that Congress intended the Postal Reorganization Act to have no effect on administrative or judicial proceedings commenced prior to enactment of the Act, except that the Postal Service would assume those functions concerned with such proceedings which had been handled by the Post Office Department prior to the Act. The Act became law on August 12, 1970, and Section 2002(a) became effective on July 1, 1971,[3] after plaintiff's claim arose and after plaintiff had initiated proceedings before the CSC. The administrative proceedings before the CSC were part of the adjudicatory process which was provided by law to allow adjudication of claims of discharged employees. Therefore, we hold that the Postal Reorganization Act had no jurisdictional effect on the proceedings in this case involving the plaintiff's claim that he was improperly discharged. Since the plaintiff could maintain an action against the United States in this court prior to enactment of the Postal Reorganization Act, he may still maintain such an action under the facts of this case.

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tions, suits, actions, or other proceedings may be asserted by or against the Postal Service or such official of that Service as may be appropriate and, in any litigation pending when this section takes effect, the court may at any time, on its own motion or that of any party, enter an order which will give effect to the provisions of this subsection.

"(2) If before the date on which any provision of this Act takes effect any department or agency, or officer thereof in his official capacity, is a party to a suit, and under this Act—

"(A) such department or agency is transferred to the Postal Service; or

"(B) any function of such department, agency, or officer is transferred to the Postal Service;

such suit shall be continued by the Postal Service."

3. Postal Reorganization Act, Pub. L. 91-375, § 15(a), Aug. 12, 1970, 84 Stat. 787. See note following 39 U.S.C. § 2002 (1970).

Plaintiff's argument in support of his motion for summary judgment is that his written statement to the Postal Inspector on March 17, 1969, was obtained in such a manner as to make it inadmissible against him; and that without the statement, the charge of misuse of official funds, and the adverse decision of the CSC, were not supported by substantial evidence. The plaintiff contends that the statement was inadmissible because the Inspector coerced it from him by forcing him through threats to choose between losing his job if he failed to answer the Inspector's questions and surrendering his fifth amendment privilege against self-incrimination if he did answer the questions. He cites the Supreme Court's decisions in *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968); and *Garrity v. New Jersey*, 385 U.S. 493 (1967); and this court's decision in *Kalkines v. United States*, 200 Ct. Cl. 570, 473 F.2d 1391 (1973), as direct support for his position.

In *Kalkines*, we relied on *Uniform Sanitation Men*, and *Gardner* and *Garrity* to a lesser extent, in holding that an employee may not be put to a choice between possibly going to jail for answering questions and losing his job for not answering, and then be fired for not answering. The plaintiff in that case had been under criminal investigation during the same time that he was being investigated by his employing agency, the Bureau of Customs of the Treasury Department. The Bureau of Customs' investigators never told the plaintiff that he had a constitutional privilege to remain silent. On the contrary, he was specifically told of agency regulations which required him to disclose any information requested by customs agents. Since the customs agents also failed to

advise the plaintiff that if he did disclose requested information, such information or its fruits could not be used in a criminal prosecution, we held that discharging him for failing to disclose the requested information was improper.

Plaintiff in the case at bar argues that the Postal Inspector placed him in the same dilemma that the customs agents placed the plaintiff in *Kalkines*. Therefore, the argument continues, the written statement given to the Inspector was the product of coercion. Plaintiff states that several Postal Manual regulations[4] were in effect on March 17, 1969, which support his argument that his failure to answer questions would have resulted in his dismissal from the Post Office Department. He states that he either knew or should have known of the allegedly coercive regulations, and, therefore, he should have been warned that any information he disclosed or its fruits

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4. The Postal Manual regulations cited by plaintiff are §§ 717.311, 744.17, 833.1, 833.3.

Section 717.311 provides in pertinent part:

"Removal is an action to effect the absolute separation of an employee other than temporary or probational for cause, involving misconduct, delinquency, or inefficiency or other cause not covered by one of the separation terms described in this part, for example:

* * * *

"b. Serious infractions of postal regulations."

* * * *

Section 744.17 provides:

"Employees shall cooperate in any postal investigation."

Section 833.1 provides in pertinent part:

"Investigations are made by postal inspectors to determine responsibility for * * *:"

* * * *

"e. Loss of Government funds, accountable paper or property through theft, embezzlement, or otherwise."

Section 833.3 provides:

"Postmasters and employees are often called on for information and assistance during investigations of the subjects mentioned in 833.1. Such co-operation must be extended (See 744.17)."

could not be used against him in a criminal prosecution. Since he was not so warned, he argues that his written statement was improperly considered by the CSC.

Because the Postal Inspector was investigating the possible commission of a criminal offense, and because Postal Inspectors were authorized by regulation[5] to make arrests, the investigation of plaintiff was a criminal investigation, as well as a postal investigation. Nevertheless, we conclude that the investigation of the plaintiff did not place him in a position where he should have reasonably believed that he would lose his job if he failed to disclose possibly incriminating information.

The BAR found that the plaintiff's written statement was not given under circumstances which would make it inadmissible in the adjudication of his case. While such a finding is not as specific as it could have been, we think it encompasses a finding that the plaintiff was not told that he would lose his job if he remained silent. Before the BAR, one of the plaintiff's complaints was that he was unduly pressured into making his statement. Also, when the plaintiff filed a list of errors and corrections in the transcript of the agency hearing, one of his corrections was that the Postal Inspector had told

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5. 39 C.F.R. § 831.9 (1969). Section 831.9 provided in pertinent part:

"(a) *Authorization.* Postal Inspectors are authorized to perform the following functions in connection with any matter within their respective official duties as established by the Chief Postal Inspector.

* * * *

"(3). Make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony."

* * * *

him he would be fired if he remained silent. Therefore, we think the issue of whether or not the plaintiff was threatened with dismissal for remaining silent was clearly before the BAR, and that the issue was decided against the plaintiff.

This court has said on many occasions that we will not disturb a CSC decision in a dismissal case unless the decision was arbitrary, capricious, or not supported by substantial evidence. *Grover v. United States,* 200 Ct. Cl. 337 (1973); and cases cited therein. At the agency hearing, the Postal Inspector testified that he never told the plaintiff that he would be fired if he did not admit guilt. Additionally, at the CSC hearing, the Inspector and the South Houston, Texas Postmaster testified that plaintiff had willingly made his statement. Also, the Postmaster testified that nine days after the statement was made, he had a meeting with plaintiff to discuss possible actions that could be taken against plaintiff. According to the Postmaster, plaintiff never suggested that he had been subjected to any undue pressure prior to making his statement. The testimony of the Inspector and the Postmaster clearly constitutes substantial evidence in support of the BAR's finding that plaintiff was not threatened with losing his job if he remained silent.

Even though plaintiff was not specifically threatened with discharge for failing to speak, he claims that the *Kalkines* decision still made his statement inadmissible because the existing Post Office Department regulation at the time of his statement could reasonably have been interpreted so as to have required him to give incriminating information to investigators. However, the Postal Manual regulations on which the plaintiff relies cannot be so interpreted. Those regulations say essentially that

postal employees must cooperate in any postal investigation or face the possibility of an involuntary separation. They do not state or suggest that the duty to cooperate is absolute and unqualified at all times and in all circumstances. Most importantly, they do not require employees to disclose all information in their possession which pertains to postal matters under investigation. The cited regulations only require postal employees to do what every citizen is required to do, *i.e.*, to come forward and speak where one has relevant knowledge of a matter under investigation by authorized officials. Such regulations do not purport to abrogate the constitutional privilege of each employee to refuse to give incriminating testimony against himself.

The fact that plaintiff received no specific threats of a job loss for failing to speak, and the fact that his employing agency operated under no regulations which could reasonably be interpreted to have required him to give incriminating information to investigators, sharply distinguish this case from the situation which was involved in *Kalkines*. In that case, investigators threatened the plaintiff with a discharge for remaining silent and the employing agency had regulations which required him to either give possibly incriminating information or face a possible discharge. The regulations and the threats left no doubt that the plaintiff in that case faced a job loss if he failed to give possibly incriminating answers. The coercion resulting from placing an employee in a vise formed on one side by threats and regulations that would result in a discharge for failing to speak, and formed on the other side by the fear of a jail term for incriminating himself, made the resulting statements inadmissible against *Kalkines*. However, in the case at bar,

there was no such coercion. One element of pressure was missing here because during the investigation the plaintiff was not threatened that his failure to speak would result in his discharge from the Post Office Department, and the regulations did not so provide. Therefore, we hold that plaintiff's written statement was not coerced from him by forcing him through threats or the regulations to choose between losing his job for remaining silent and surrendering his fifth amendment right against self-incrimination.

Defendant, in its second argument in support of its motion for summary judgment, contends that the CSC decision sustaining the plaintiff's dismissal was supported by substantial evidence in the record and was neither arbitrary nor capricious. Plaintiff opposes defendant's motion on several grounds, one of which centers around his allegation that the CSC hearing examiner refused his request to provide at his own expense a court reporter in order to get a complete record of the hearing. Plaintiff concedes that no statutes or administrative regulations required the keeping of a verbatim transcript of CSC hearings. However, he argues that in view of the sensitive constitutional areas of inquiry which were involved, the refusal to allow the keeping of an exact record constituted an arbitrary and capricious abuse of discretion.

For the purpose of disposing of the defendant's motions for summary judgment, we assume that plaintiff's allegations concerning his request for a court reporter are true. This court was faced with a very similar situation in *Hora v. United States,* 147 Ct. Cl. 234, 177 F. Supp. 438 (1959). In that case, we held that the CSC's denial of a verbatim transcript was neither arbitrary nor capricious where a comprehensive summary of the hearing

was prepared, and where the plaintiff was allowed to request changes in the summary, all of which were made. We still adhere to that holding, and such adherence requires that we reject the plaintiff's argument in the instant case. A comprehensive summary of plaintiff's hearing before the CSC was prepared and submitted to the CSC Regional Office and to the BAR. Plaintiff presented additions and corrections to the summary which were noted by the Regional Office and the BAR. This procedure allowed plaintiff to receive a full consideration of his objections to his discharge. Therefore, the CSC's denial of a verbatim transcript was neither arbitrary nor capricious.

Plaintiff also contends that summary judgment for the defendant is improper because the fifth amendment guarantee of procedural due process requires that a judicial tribunal, and not an administrative agency, determine the voluntariness and admissibility of his written statement. In support of this contention, he cites the reasoning of *Jackson v. Denno,* 378 U.S. 368 (1964).

In *Jackson,* the Supreme Court dealt with New York's former procedure for determining the voluntariness and admissibility of a confession in a criminal case. The New York trial court had submitted the voluntariness issue to the jury along with the other issues in the case. The jury was instructed to disregard the confession if it was involuntary, and to determine guilt or innocence solely from the other evidence. Alternatively, if the confession was voluntary, the jury was to determine its truth or reliability and afford its weight accordingly. The Supreme Court held that this procedure did not satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

The issue raised by plaintiff's contention is to what extent the Constitution extends procedural due process protection to a terminated Federal employee in an administrative proceeding. The decision in *Jackson* did not speak to this issue since that case involved a criminal trial. However, the Supreme Court recently addressed this issue in *Arnett v. Kennedy*, 42 U.S.L.W. 4513 (U.S. April 16, 1974). In that case, a nonprobationary employee in the competitive civil service contended that his dismissal for cause without a prior hearing denied him procedural due process. The Court held that the Constitution did not require a hearing prior to dismissal. Mr. Justice Rehnquist, speaking for a plurality of the Court, said as follows:

> In sum, we hold that the Lloyd-LaFollette Act, in at once conferring upon nonprobationary federal employees the right not to be discharged except for "cause" and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations. We also conclude that the post termination hearing procedures provided by the Civil Service Commission and OEO adequately protect those federal employee's liberty interest, recognized in *Roth, supra,* in not being wrongfully stigmatized by untrue and unsupported administrative charges. * * * [*Id.* at 4522.]

By the use of this language, Justice Rehnquist seems to imply that a nonprobationary Federal employee has at least a liberty interest that is entitled to some procedural due process protection when the employee is terminated for cause.

The six Justices other than the plurality[6] seemed to agree that a Federal employee has a property interest that is entitled to procedural due process protection when the employee is discharged for cause.[7] We believe the opinions in *Arnett* clearly support the proposition that the fifth amendment guarantee of procedural due process extends some protection to a nonprobationary employee who is discharged for cause.

With these principles in mind, we examine the plaintiff's contention that the procedural due process protection which extends to government employees includes a requirement that a judicial tribunal, and not an administrative agency, determine the voluntariness and admissibility of the employees' statements. The Supreme Court's deci-

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6. Justice Powell filed an opinion concurring in part and concurring in the result in part, in which Justice Blackmun joined. Justice White filed an opinion concurring in part and dissenting in part. Justice Douglas filed a dissenting opinion. Justice Marshall filed a dissenting opinion, in which Justice Douglas and Justice Brennan joined.

7. Justice White in his opinion stated:

"[W]here there is legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State in the administration of its law, that a person be given notice and a hearing before he is finally discharged. * * *

* * * *

"To be sure, to determine the existence of the property interest, as for example, whether a teacher is tenuered or not, one looks to the controlling law, in this case federal statutory law, the Lloyd-LaFollette Act, which provides that a person can only be fired for cause. The fact that the origins of the property right are with the State makes no difference for the nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition." [*Arnett v. Kennedy, supra* at 4536.]

sion in *Jackson v. Denno, supra,* certainly does not support this argument.

The *Jackson* decision dealt only with the roles of the judge and the jury in a criminal trial. The Court was primarily interested in insuring that criminal procedures would be fully adequate to insure that defendants were afforded adequate protection under the Due Process Clause of the Fourteenth Amendment against the use of involuntary confessions. It struck down the practice of simultaneously giving the jury the evidence going to the voluntariness of a confession, as well as all of the corroborating evidence tending to show that the confession was true and that the defendant committed the crime. The Court reasoned that the jury might believe the confession and believe that the defendant had committed the very act with which he was charged, all being circumstances which might seriously distort evaluation of the accused's credibility and assessment of the testimony concerning the critical facts surrounding his confession. Therefore, the Court held that criminal defendants are entitled to a hearing on the voluntariness issue separate and apart from any consideration of the guilt or innocence issue; and that both issues may not be decided by the same jury.

The *Jackson* opinion included no discussion of the proper functions of an administrative agency and a judicial tribunal in a case involving administrative proceedings, so it is of no help to the plaintiff in the instant case. Additionally, we believe the several opinions in *Arnett* preclude a favorable decision for the plaintiff on the issue of whether or not an administrative agency may determine the voluntariness and admissibility of a confession.

If procedural due process required the voluntariness issue to be decided by a judicial tribunal, we see no reason why the entire hearing would not be required to be conducted by such a tribunal. Although the *Arnett* case dealt only with procedural due process requirements as to the time of a hearing, the Court strongly indicated that an administrative agency could conduct any required hearing. Certainly Justice Rehnquist's language which is quoted above indicates that the plurality believed that the applicable statutes and regulations afford discharged Federal employees all the procedural protection to which they are entitled. The remaining Justices, all of whom indicated that procedural due process guarantees extend to discharged employees, never questioned in the slightest the practice of allowing administrative agencies to conduct required hearings. Therefore, the Court strongly indicated that hearings before administrative officers are sufficient to provide discharged Federal employees any procedural protections to which they are entitled. We know of no reason why the issue concerning the voluntariness of a confession should be treated any differently from the other issues which an administrative body, or a hearing officer, must decide during the course of a hearing. Therefore, we hold that the CSC acted properly in determining the voluntariness of the plaintiff's statement and in ruling on the statement's admissibility.

Plaintiff's final argument in support of his contention that summary judgment for the defendant should be denied is that there is a fact question as to the voluntariness of his confession which must be resolved by this court. He alleges that his written statement was coerced from him, and that he was warned of neither his right to remain

lent nor his right to counsel prior to his making the statement.

As we noted above, the BAR found that plaintiff's written statement was not made under circumstances which would make it inadmissible in the adjudication of his case. We believe this finding was adverse to plaintiff's claims of coercion and lack of warnings. Therefore, the issue is whether or not the record contains substantial evidence in support of the BAR's finding.

The record of the agency hearing shows that the investigating Postal Inspector testified that prior to taking plaintiff's statement, he told plaintiff that he (the plaintiff) did not have to make a statement and that he had a right to have an attorney present. The record also indicates that the Inspector testified that he did not speak threateningly to plaintiff during the interrogation. The record of the hearing before the CSC Hearing Examiner shows that the Inspector again testified that he had given plaintiff complete warnings and had not threatened him. The same record also shows that the South Houston Texas Postmaster testified that he met with plaintiff on March 26, 1969, to discuss the plaintiff's situation, and that during the meeting, the plaintiff made no allegations of coercion. The first paragraph of the written statement signed by the plaintiff stated as follows:

> I, C. C. Terry, having been duly sworn wish to make the following statement. This statement is made of my own free will. No threats or promises have been made to me. I have been advised that I do not have to make any statement and that any statement I make can be used against me. I have also been advised of my constitutional rights including my right to an attorney. I understand my rights and I do not desire an attorney at this time.

This statement may not prove a lack of coercion, but it is at least some evidence that the plaintiff received the proper warnings. The statement itself provides the warnings concerning the right to remain silent and the right to legal counsel. We believe that all of this evidence, which was before the BAR, constitutes more than substantial evidence in support of the finding that plaintiff's statement was not inadmissible. Therefore, we hold that the BAR properly found that plaintiff's statement was admissible.

Plaintiff's statement, and the testimony of the Postal Inspector and the Postmaster concerning the statement, certainly support the charge that plaintiff misused official funds. In addition, the BAR had other evidence before it which tended to show that plaintiff had misused official funds. The shortage in the plaintiff's fixed credit funds, plaintiff's attempt to place money in his cash drawer, and the money order receipts which corroborated plaintiff's written statement supported a finding of misuse of funds by plaintiff. The sum of this evidence, as the defendant contends, easily constitutes substantial evidence in support of the BAR's finding that plaintiff misused official funds as charged. Therefore, we hold that the BAR properly found that there was sufficient cause for plaintiff's discharge.

For the reasons stated above, we hold that the decision of the BAR was supported by substantial evidence and was neither arbitrary nor capricious. Accordingly, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

APPENDIX "B"

IN THE

United States Court of Claims

13-73

CLIFFORD C. TERRY v. THE UNITED STATES

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

ORDER

These cases come before the court on plaintiffs' motions for oral argument, for relief from judgment or order and for rehearing under Rules 151 and 152 of the Rules of this court. Upon consideration thereof, without oral argument,

IT IS ORDERED this 1st day of November, 1974, that said motions be and the same are denied as follows:

. . .

13-73 Clifford C. Terry. Plaintiff's motion, filed September 16, 1974, for rehearing. [Opinion of the court of June 19, 1974]

BY THE COURT

/s/ WILSON COWEN
Chief Judge

APPENDIX "C"

Title 39, Code to Federal Regulations, Sec. 742.12:

This statement of ethical conduct is provided to instruct and to guide those employees entering the Service for the first time, and also as a reminder to all employees of the conduct required and expected of them in carrying out their official duties.

Title 39, Code to Federal Regulations, Sec. 742.735-23(b):

A violation of the standards of conduct set forth in this part, or in the laws referred to in this part, may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

Title 39, Code to Federal Regulations, Sec. 742.735-33:

Specific Statutes Applicable to Postal Employees

a. Subject:	18 U.S.C.
. . .	
Misappropriation of Postal Funds	1711
Falsification of Postal Returns	1712
Improper Issuance of Money Orders	1713

Title 39, Code to Federal Regulations, Sec. 742.735-81(a):

The Code of Ethical Conduct contained in this part and related parts of the Postal Manual containing instructions and guidance on the conduct of employees and special Government employees, shall be brought to their attention not less frequently than twice a year.

Postal Manual, Sec. 717.311:

Removal is an action to effect the absolute separation of an employee other than temporary or probational for cause, involving misconduct, delinquency, or inefficiency

or other cause not covered by one of the separation terms described in this part, for example:

a. . . .
b. Serious infractions of postal regulations . . .

Postal Manual, Section 742.8:

81. ALL EMPLOYEES AND SPECIAL GOVERNMENT EMPLOYEES. The *Code of Ethical Conduct* contained herein, Part 744, *Conduct of Employees*, and related sections of the Postal Manual containing instructions and guidance on the conduct of employees and special Government employees, shall be brought to their attention not less frequently than twice a year.

Postal Manual, Sec. 742.11:

Postal employees have, over the years, established a fine tradition of faithful service to the Nation, unsurpassed by any other group. Each employee should take great pride in this tradition of dedicated service. Each of us must strive to make his contribution worthwhile in the continued movement of the Postal Service toward future progress in the public interest.

Postal Manual, Sec. 742.13:

All postal personnel must act with unwavering integrity and complete devotion to the public interest. Postal personnel are expected to maintain the highest moral principles, and to uphold the laws of the United States and the regulations and policies of the Post Office Department. Not only is ethical conduct required, but officials and employees must be alert to avoid actions which would appear to prevent fulfillment of postal obligations. Assigned duties must be discharged conscientiously and effectively. The Postal Service has the unique privilege of having daily contact with the majority of the citizens of the Nation, and is in many instances their most direct contact with the Federal Government. Thus, there is an

especial opportunity and responsibility for each postal employee to act with honor and integrity worthy of the public trust, thereby reflecting credit and distinction on the Postal Service, and on the entire Federal Government.

Postal Manual, Section 742.32:

Each employee shall acquaint himself with each statute that relates to his ethical and other conduct as an employee of the Department and of the Government. These include the general miscellaneous statutes cited herein. Copy of these statutes is available from, or through, the head of each postal installation or activity. . . .

Postal Manual, Section 744.17:

Employees shall cooperate in any postal investigation.

Postal Manual, Sec. 833.1:

Investigations are made by postal employees to determine responsibility for and whether collections should be made in connection with:

. . .

e. Loss of Government funds, accountable paper or property through theft, embezzlement, or otherwise.

Postal Manual, Sec. 833.3:

Postmasters and employees are often called for information and assistance during investigations of the subjects mentioned in 833.1. Such cooperation must be extended. (See 744.17).

APPENDIX "D"

April 24, 1969

Mr. Clifford C. Terry
Regular Clerk
U. S. Post Office
South Houston, Texas 77587

Dear Mr. Terry:

This refers to the letter of proposed adverse action issued you on March 20, 1969, in replacement of the letter of proposed adverse action dated March 18, 1969. Both letters were issued by Postal Inspector R. H. McDonald, Jr. This is your notice of my decision on the numbered charge.

I have given consideration to your affidavit statement of March 17, 1969, to Postal Inspector R. H. McDonald in which you stated that, on March 3, 1969, you issued two money orders to yourself in order to pay bills, the total of which amounted to $50.70 and in payment for which you placed only $20 in your cash drawer. I have given consideration to the oral statements that you made in relation to the letter of proposed adverse action when speaking to Mr. L. V. Teston, Postmaster at South Houston, on March 26, 1969. I have considered your letter of March 28, 1969, to Mr. Teston requesting that you be retained in the Postal Service at South Houston or transferred to another Post Office. I have considered, also, the content of the letter of March 28, 1969, written on your behalf by Attorney Don Bradshaw, wherein denial is made that you converted any funds to your personal use and that the Inspector may have misunderstood your "answers, musings, and wonderings".

I find that the charge, identified as Charge No. 1, is supported by the fact of the shortage in your fixed credit and by the explanation you initially gave for it. The charge is sustained.

On the basis of the sustained charge, I have decided that favorable consideration will not be given to your request for retention in the Postal Service and that you will be removed effective May 9, 1969.

Because you are a career employee who has completed probation, you have the right to appeal this adverse decision either to the Director, U. S. Civil Service Commission, 1114 Commerce Street, Dallas, Texas 75202, or to the Assistant Postmaster General, Bureau of Operations, Post Office Department, Washington, D.C. 20260. Your appeal to the Commission or through the Department's appeal procedures can be submitted at any time after receipt of this decision letter but not later than 15 calnedar days after the effective date of the adverse action. If you appeal through the Department's procedures within 10 calendar days of receipt of this adverse decision, the adverse action will not be imposed until a decision has been rendered by the Assistant Postmaster General, Bureau of Operations.

If you decide to appeal this decision either to the Civil Service Commission or through the Department's procedures, you must submit your appeal in writing and clearly identify the reasons on which you base the appeal. If you want a hearing, include in your letter of appeal a statement that a hearing is wanted. If you do not want a hearing, so state.

If you appeal this decision to the Civil Service Commission, you have no right of appeal through the Postal procedures. If you appeal to the Assistant Postmaster General, Bureau of Operations, you will, after that office renders the appellate decision, have the right to appeal that decision either to the Civil Service Commission or to the Department's Board of Appeals and Review.

I assure you that in the event you do decide to appeal that you will:

a. Have freedom from restraint, interference, coercion, discrimination or reprisal, and

b. Have the right to be accompanied, represented, and advised by a representative of your own choosing.

Because you are suspended during the notice period, you cannot be given official time in which to prepare your presentation. However, if you choose a postal employee to represent you or assist you in filing your appeal, that employee is entitled to a reasonable amount of official time to help you in the development and presentation of your appeal. Your representative is also assured of freedom from restraint, interference, coercion, discrimination or reprisal.

My decision to remove you and your possible appeal of this decision does not affect the status of your emergency suspension. If you file an appeal with either the Assistant Postmaster General, Bureau of Operations, or with the Civil Service Commission, please furnish us with a signed copy of the appeal. You should also furnish a signed copy to the Postmaster at South Houston, Texas.

Sincerely yours,

/s/ R. D. Rheiner

B. M. MYERS, JR.
Deputy Regional
Director

cc: Disciplinary File
Postmaster, South Houston, Texas
Postal Inspector in Charge (3)
Reference Case No. 5670-FI
Mr. Don Bradshaw, Attorney
9141

APPENDIX "E"

Mr. Clifford C. Terry
7418 Greenstone
Houston, Texas 77017

Dear Mr. Terry:

This appellate level has completed its examination of your appeals from the adverse decisions of the Regional Director at Dallas, Texas, as outlined in his letters to you dated March 26, 1969 and April 24, 1969.

A careful review has been made of the charge against you, your oral and written replies, the Postmaster's recommendation and the summary and findings of fact report established as a result of your requested hearing of June 20, 1969. Consideration has also been given to your years of service and the character reference letters from Mrs. Margaret Measel and Mr. H. H. Fried submitted in your behalf and entered into the record, as requested. Your exceptions to the summary and findings of fact report were also reviewed and considered.

You are charged with misuse of official funds while employed as a clerk in the South Houston, Texas post office on March 3, 1969. Details of the charge are contained in the notice of proposed adverse action, dated March 20, 1969.

Charge Number I cites that you issued two money orders in the amounts of $15.00 and $35.00 for your personal use. Both transactions required fees of 35¢ each which totaled the entire amount of $50.70. You placed only $20.00 in your cash drawer. You converted the balance of fixed credit funds to your personal use to account for these two money orders at the close of business on March 3, 1969. The charge is supported by the testimony of Postal Inspector R. H. McDonald and your sworn affidavit of March 17, 1969 when you admitted to the misuse of funds. You did not testify at your hearing. Your

witnesses testified as to your character reference; however, they were not familiar with the *infraction* and, therefore, could not refute the charge. Based upon the substantial evidence of record, Charge Number 1 is sustained.

The charge against you is an administrative action and as such does not necessarily rely upon the findings of a criminal court. The Post Office Department cannot condone your improper actions of misusing funds from your fixed credit. Based upon the sustained charge, your removal is considered to be both in the best interests of and will promote the efficiency of the postal service. The Regional Director's decision to remove you from the postal service is sustained. You will be advised locally of the effective date of your removal. The decision to place you on emergency suspension pending disposition of the charge is considered to have been both warranted and necessary in order to insure the security of official funds and is also sustained.

You have the right of electing to appeal this decision to one of the following: (1) the Board of Appeals and Review, Bureau of Personnel, Post Office Department, Washington, D.C. 26260, (2) to the Director, Civil Service Commission, 1114 Commerce Street, Dallas, Texas 75202, or (3) if you are a member of a unit where exclusive recognition has been granted to an employee organization having an agreement for advisory arbitration, you may, with the organization's consent, appeal to arbitration provided the organization is willing to pay one-half of the cost.

An appeal to the Board of Appeals and Review should contain a full statement as to the reasons for appealing this decision and include a copy of the decision of this office. If you appeal to the Board of Appeals and Review, you do not have a further right to appeal to the U. S. Civil Service Commission. If you elect to appeal to the U.S. Civil Service Commission, you do not have

a further right to appeal to the Board of Appeals and Review.

Any further appeal must be in writing at any time after receipt of this letter of decision but not later than fifteen (15) calendar days after the adverse action has been affected. If the adverse action has been effected prior to this decision, you have fifteen (15) days from the recipt of this letter within which to appeal. A signed copy of your appeal must also be furnished to this office.

Sincerely yours,

/s/ F. J. Nunlist
F. J. Nunlist

OP:LS:dlg
11/17/69

cc: Mr. Filbey, UFPC
Mr. Bradshaw, Attorney
RD - Dallas (2) √
Subject
Reading

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

APPENDIX "F"

UNITED STATES CIVIL SERVICE COMMISSION DALLAS REGION, DALLAS, TEXAS

APPEAL OF MR. CIFFORD C. TERRY UNDER SUBPART B OF PART 752 OF THE CIVIL SERVICE COMMISSION REGULATIONS

PART I. INTRODUCTION

Mr. Clifford C. Terry, 7418 Greenstone, Houston, Texas, appealed to the Civil Service Commission from a personnel action accomplished by the Postmaster, U.S. Post Office, South Houston, Texas, in removing him on November 28, 1969, from the position of Distribution and Window Clerk, PFS-4, 7,702 per annum.

Mr. Terry presented satisfactory evidence of his entitlement to appeal to the Civil Service Commission. He has a competitive status and he has completed a probationary period. The adverse action appealed, a removal accomplished by an administrative officer so acting, falls within the purview of the regulations. The appeal was filed within the Commission's established time limit.

Mr. Terry filed an administrative appeal with the Post Office Department. A hearing was conducted in the matter. The appeal was rejected.

Mr. Terry elected to have a personal hearing conducted in his case in connection with his appeal to the Civil Service Commission. A hearing was held in the matter at Houston, Texas, on February 26, 1970. The agency was represented at the hearing. Exceptions taken by the appellant to the hearing summary have been noted.

PART II. ANALYSIS AND FINDINGS

By letter dated March 20, 1969, Mr. Terry was advised of a proposed personnel action which would remove him from the Government Service. This document, signed by Mr. R. H. McDonald, Jr., Postal Inspector, informed appellant of the exact reasons for the proposed removal, allowing him a reasonable length of time, ten calendar days, in which to file an administrative reply. Following agency consideration of verbal and written responses made by the appellant, a letter was addressed to Mr. Terry on April 24, 1969, informing him that an adverse determination had been reached in his case. This document signed by Mr. B. M. Myers, Jr., Deputy Regional Director, Dallas Regional Post Office Department, and received by the appellant no later than May 2, 1969, set forth the reasons relied upon for the adverse determination.

An administrative appeal was made to the Post Office Department by Mr. Terry by letter dated May 2, 1969. In keeping with the appellant's request, a hearing was conducted in his case on May 21, 1969. Following consideration of the record, the Assistant Postmaster General, Mr. F. J. Nunlist, signed a decision in the case on November 21, 1969. This document, received by the appellant on November 22, 1969, informed him that his appeal had been rejected, and in keeping with the terms of the decision, Mr. Terry was removed from the Post Office Department's rolls on November 28, 1969. He was informed of the reasons finally relied upon for his removal and he was told of his appeal rights in the matter.

Mr. Terry was not retained in an active duty status during the advance written notice period. In this connection he was suspended from duty pending the adjudication by the

Post Office Department of his proposed removal. He was advised by letter dated March 20, 1969, received March 21, 1969, that his suspension was contemplated because of the exact reasons that had been advanced for his removal. He elected not to file a reply with reference to the proposed suspension and his suspension was effected on March 31, 1969, in keeping with the terms of a decision issued on March 26, 1969, and received by the appellant on March 28, 1969.

In view of the above showing in the record, and after carefully reviewing the entire file in the case, it must be concluded that the Post Office Department has complied with all of the mandatory procedural requirements of controlling regulations in this case. Thus, the merits of the appeal must be reviewed.

Mr. Terry has been removed from the service based upon a charge that reads as follows:

> *"Charge No. 1:*
>
> "You are charged with misuse of official funds while employed as a clerk in the South Houston, Texas post office on March 3, 1969, in that you issued Money Order No. 7,488,472,434 in the amount of $15.00 with fee of 35¢, and Money Order No. 7,488,472,435 in the amount of $35.00 with fee of 35¢ for your personal use and placed only $20.00 in your cash drawer for these two money orders. You converted $30.70 of fixed credit funds to your personal use to account for these two money orders at the close of business on March 3, 1969."

Mr. Terry contends, by his appeal to the Commission, that he did not commit the offenses charged by the Post Office Department and that he was therefore, improperly removed from the service.

The Post Office Department contends that Mr. Terry conducted himself exactly as alleged by their charge and that since he did in fact commit the cited offenses, his removal was in order.

The agency has, in support of their case, submitted a sworn statement signed by Mr. Terry on March 17, 1969, before a Postal Inspector. This affidavit reads as follows:

> "I, C. C. Terry, having been duly sworn wish to make the following statement. This statement is made of my own free will. No threats or promises have been made to me. I have been advised that I do not have to make any statement and that any statement that I make can be used against me. I have also been advised of my constitutional rights including my right to an attorney. I understand my rights and I do not desire an attorney at this time.
>
> "I am being questioned by a postal inspector. On this date Inspector McDonald audited my fixed credit in the amount of $2,320.00 and found it to be short in the amount of $101.62. I made a separate count and computation and agreed with the results of the inspector's audit. Before we started to count my fixed credit I attempted to place some money in my cash drawer because I knew it was short. The inspector noticed my attempt and would not allow me to place the money from my personal funds in the cash drawer.
>
> "On January 15, 1969, my fixed credit was audited by Mr. Van Burkleo, assistant postmaster, and it was found to be $45.19 over. I made a separate count and computation and agreed with the overage. On my previous audit I was $24.01 short and I asked for an adjustment and it was denied. I made the statement in the presence of other employees that I would get the $45.00 back. I did not remove this amount, but was merely making a threat while I was angry.

"On March 3, 1969, I issued two money orders to myself to pay two bills. I issued Money order No. 7,488,472,434, in the amount of $15.00 payable to the Houston Postal Credit Union, Houston, Texas; and No. 7,488,472,435 in the amount of $35.00, payable to the Harris County Juvenile Probation Department, Houston, Texas. The two money orders plus fees came to a total of $50.70. I only put $20.00 in my cash drawer to pay for these two money orders. I knew my fixed credit was at least $30.00 short due to these two money orders and I was trying to replace the $30.00 from my personal funds when the inspector noticed me attempting to put money in my cash drawer. I can not offer any explanation for the remaining $70.92 shortage. My failure to fully pay for the two money orders is the only time I have ever used any of my fixed credit funds for my personal use.

"I have this date made full restitution for the $101.62 shortage. I am 41 years of age, born 10-15-27. I am married and reside with my wife. I have two children by a previous marriage. I have been employed by the South Houston, Texas post office since May 12, 1966. I was employed by the Houston, Texas post office for about 14 years from 1951 until 1965. I have never had any trouble with the law except in connection with failure to pay child support several years ago.

"I have read this statement and it is true."

Collective testimony and statements made by the involved Postal Inspector, Mr. R. H. McDonald, Jr., and the South Houston, Texas Postmaster, Mr. L. B. Teston, support the agency's allegations. According to the statements made by these two individuals, Mr. Terry willingly signed the March 17, 1969 affidavit and he did not make any claim that he had been unduly pressured into making the admission.

Statements made by the appellant and by his Attorney collectively assert that Mr. Terry was ill suffering from Flu symptoms at the time his accounts were audited and when he signed the March 17, 1969 affidavit before the Postal Inspector; that he had been questioned concerning the matter for some seven or eight hours before the affidavit was prepared by the Inspector and he, the appellant, had signed it; that he attempted to place some money in the cash drawer before the funds were counted only because he felt from observations of his accounts that he was short some rolls of six cent stamps; that he did not convert any of his fixed credit funds to his personal use; and that he had at all times properly handled Government funds. Remarks made for the record by the appellant and his Attorney assert that Mr. Terry was not "warned" of his legal rights until the Inspector had prepared the March 17, 1969 affidavit, that the appellant had on many occasions when receiving overpayments from patrons, returned such funds on his own initiative, that the Inspector repeatedly told Mr. Terry while questioning him, that he, the appellant, was going to the penitentiary and if the affidavit was not signed, that he would "file on me;" and that he did not tell Mr. McDonald that he had purchased two money orders and had not paid for them. The appellant has submitted for the record statements signed by two patrons of the South Houston Post Office attesting to their belief that the appellant was honest and trustworthy. One patron recalled that she had made a mistake "in adding currancies and" that this had been called to her attention by the appellant. The file also contains a statement signed by a member of the United States Attorney's staff attesting to the fact a motion to dismiss criminal charges in the appellant's case had been approved in July of 1969.

A Tax Accountant testified at the time of the agency hearing that he had been a patron of the South Houston, Texas Post Office and in that manner became acquainted with the appellant and that he also did some work for Mr. and Mrs. Terry. This individual testified that he believed the appellant to be honest and trustworthy, that the appellant had on one occasion returned an overpayment made by the Accountant in connection with the purchase of stamps and that the Terrys had also declined to take advantage on their income tax of claims that would not have been reviewed by the Internal Revenue Service.

Several employees testified at the time of the agency hearing that they had worked with Mr. Terry and that they believed he was honest and trustworthy.

The appellant's wife testified at the time of the agency hearing, remarking that she was present during some of the questioning of her husband by the Postal Inspector, that the Inspector had on numerous occasions informed Mr. Terry that he could receive a five-year imprisonment term, that the Inspector's remarks had been made in "a threatening manner," that the Inspector repeatedly told her husband that he, the appellant, had stolen funds from his cash drawer and that her husband was "extremely upset" on that day his accounts were audited.

After carefully reviewing the total record in this case, we must conclude that the agency has presented a most convincing case. A preponderance of the evidence supports their allegations. The appellant has not, in our judgment, made a convincing showing that his March 17, 1969 statement is incorrect. In view of the foregoing, we must sustain the agency's charge.

PART III. DECISION

Since evidence of record does support the agency's charge and in view of the fact the Post Office Department processed Mr. Terry's removal and suspension in keeping with required procedures, we must sustain the discharge. In this connection we believe that the removal of the appellant was for such cause as will improve the efficiency of the service.

PART IV. NOTIFICATION OF FURTHER APPEAL RIGHT

Unless this decision is further appealed within fifteen calendar days of the day it is received, it becomes the final decision of the Civil Service Commission. Two copies of any further appeal should be addressed to the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415. Since a further appeal does not include the right to a hearing before the Board of Appeals and Review, any representations which the Board should consider beyond those now in the appeal file must be submitted in writing. Please send two copies. Please notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board. Attached is Civil Service Commission Form 942. This form explains the procedure that governs the processing of adverse action appeals to the Board of Appeals and Review.

For the Regional Director

/s/ GEORGE S. YRISARRI
George S. Yrisarri
Appeals Examiner

APPENDIX "G"

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW

Washington, D. C. 20415

DECISION

IN THE MATTER OF

CLIFFORD C. TERRY

TYPE CASE: *Removal*

INTRODUCTION

By letter dated April 15, 1970, the above-named appellant, through counsel, appealed to the Board of Appeals and Review from a decision issued on April 13, 1970 by the Commission's Dallas Regional Office sustaining the Post Office Department in removing Mr. Terry from the position of Distribution and Window Clerk (Carrier), PFS-5, $7,702 per annum, effective November 28, 1969.

STATEMENT OF THE CASE

Mr. Terry was advised by letter of March 18, 1969 (amended March 20 and March 26, 1969), signed by R. H. MacDonald, Postal Inspector, that it was proposed to remove him from the U. S. Post Office, South Houston, Texas for misuse of official funds. The reasons for the proposed action were set out in the advance notice. It was also proposed in that advance notice to suspend Mr. Terry. The appellant did not reply to the suspension, and thereafter on March 26, 1969, the appellant was notified that he was suspended pending a decision on the charge. The suspension was effective March 31, 1969.

On April 24, 1969, another decision was issued, finding that the charge was sustained and that the appellant's separation from employment was in the best interest of the service.

Mr. Terry appealed the decision through the agency's appellate system as provided for under Part 771 of the Civil Service Regulations, and after affording Mr. Terry a hearing on May 21, 1969, the agency issued its final decision on November 21, 1969, finding that his removal was warranted and was for such cause as would promote the efficiency of the service. Mr. Terry appealed the removal to the Commission's Dallas Regional Office by letter of December 12, 1969.

FIRST LEVEL DECISION

The Regional Office, after affording a hearing to the appellant, issued its decision on April 13, 1970, finding no procedural errors in effecting Mr. Terry's removal and with respect to the merits, finding that the charge was supported by the evidence of record. The Region concluded therefrom that Mr. Terry's removal was for a cause which promoted the efficiency of the service.

REPRESENTATIONS TO BOARD OF APPEALS AND REVIEW

The Board has considered all of the representations submitted in behalf of the appellant, including those contained in the transcript of the hearing held by the agency and in the summary of the hearing before the Civil Service Commission as well as the appellant's objections to both hearings. The Board finds that the Regional Office correctly evaluated the evidence with respect to all of the procedural and substantive issues of this case

and the Board agrees with, and therefore adopts the findings and conclusions of the Regional Office.

In addition to various objections to the hearing summaries and the Regional Office decision, the appellant alleges that his affidavit of March 17, 1969 given to Postal Inspector MacDonald was obtained under improper circumstances, hence, not admissible and should not be considered by the Board in adjudicating his case.

The charge reads as follows:

> On March 3, 1969, you issued Money Order #7,488,472,434, in the amount of $15 with fees of 35 cents and Money Order #7,488,472,435, in the amount of $35 with fee of 35 cents for your personal use and placed only $20 in your cash drawer for at least two money orders. You converted $30.70 of fixed credit funds to your personal use to account for these two money orders at the close of business on March 3, 1969.

Briefly, the record reflects that certain fluctuations in Mr. Terry's cash drawer caused the Postmaster to become concerned to the point of asking for an official audit of Mr. Terry's accounts. A subsequent audit of the appellant's accounts by a Postal Inspector disclosed a shortage of $101.62. The shortage has not been denied by the appellant, in fact, prior to the audit he made an effort to conceal the shortage by attempting to place money in his cash drawer but was observed and stopped by the Postal Inspector. After the audit, the appellant verbally admitted that he had issued to himself two (2) money orders totaling $50.70 but placed only $20 cash in his cash drawer. At this point the record shows that there was a break in the appellant's interrogation. The appellant was permitted to go to his home to locate and

return the money order stubs for the two money orders he issued himself. During this absence the appellant picked up his wife and brought her to the Post Office with him. Mr. Terry's wife was permitted to witness part of the interrogation and then left of her own free will. Mrs. Terry claims that the Postal Inspector refused to let the appellant call an attorney, however, the Board observes that since she knew the seriousness of the allegation, there was nothing to keep her from calling an attorney after she left the Post Office. The Board also notes that as a Federal employee with over fifteen years of service in the U. S. Post Office, the appellant knew the seriousness of the allegation and had ample time to call an attorney while he was away from the Post Office. He did not.

Soon afterwards on the same day, Mr. Terry signed an affidavit admitting that he issued to himself two money orders for the total sum of $50.70 that he had placed only $20 in his cash drawer, that he attempted to place money in his cash drawer immediately prior to the audit and that he agreed with the Postal Inspector's audit. Mr. Terry could not explain the remaining $70.92 shortage.

Mr. Terry now claims that the affidavit was given under pressure from the Postal Inspector, however, the record shows that after the audit and before he signed the above mentional affidavit he was permitted to leave the Post Office, and that he returned with his wife who was then permitted to be present during part of the interrogation. Further, the record shows that on March 26, 1969, Mr. Terry visted the Postmaster, Mr. L. V. Teston, at which time he admitted having made a serious mistake and, that he had been apprehended for this mistake. He stated that he realized the seriousness of the offense,

acknowledged that some form of penalty was applicable, however, he asked for leniency. Specifically; he suggested a transfer to another office. After considering the facts and circumstances in Mr. Terry's case the Board finds that Mr. Terry's affidavit of March 17, 1969 was not given under circumstances which would make it inadmissible in the adjudication of his case.

The Board after giving careful consideration to the record including the appellant's objections to the hearing summaries and the Regional Office decision, find that the evidence fully supports the charge that the appellant misused official funds on March 3, 1969 while employed as a clerk at the South Houston Post Office.

In summary, notwithstanding the favorable factors relating to the appellant's reputation with the public, including statements made concerning his honesty, the Board is of the opinion that the action of the Post Office in removing the appellant based on the sustained charge was fully justified. The Board concludes as did the Regional Office that the appellant's removal was for such cause as would promote the efficiency of the service.

DECISION

The Board affirms the decision of the Commissioner's Dallas Regional Office issued on April 13, 1970.

Section 772.307(c) provides that the decision of the Board is final and there is no further right of appeal.

For the Commissioners:

WILLIAM P. BERZAK
William P. Berzak
Chairman

September 9, 1970